

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI STATE BOARD OF REGISTRATION
FOR THE HEALING ARTS,
Relator,

vs.

THOMAS J. BROWN, III
CIRCUIT JUDGE, DIVISION I
CIRCUIT COURT OF COLE COUNTY,
Respondent.

WD No. 61687

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent does not agree that this Court has jurisdiction to grant the relief requested by the Board, and Respondent hereby asserts that he is filing this Brief only in obedience of Supreme Court Rule 84.24(i). Respondent additionally asserts that by doing so he is not waiving any claim or assertion pending in this matter concerning this Court's jurisdiction to proceed.

Were this matter in a proper procedural posture to be the subject of a writ proceeding as sought by the Board, Respondent agrees that this Court would have jurisdiction to hear the case under its territorial jurisdiction, pursuant to Section 477.070, RSMo. 2000.

STATEMENT OF FACTS

Respondent (who will alternatively be referred to herein as “Judge Brown”) takes this opportunity herein to dispute and correct certain statements set forth as fact in Relator’s brief, and to note statements therein which would more appropriately be reserved for Relator’s argument.

Initially, on page 6 of its brief, Relator (which will alternatively be referred to as “the Board”) states the following in reference to the underlying matter’s status during the appeal to the Supreme Court:

“Had the Missouri Supreme [sic] determined that no Equal Protection violation occurred, Respondent’s remand would have been overturned. Alternatively, had the Missouri Supreme Court determined that an Equal [sic] violation occurred, Respondent’s remand would have been mooted.”

(Realtor Brief, pp. 6-7.) Respondent suggests that whatever action the Supreme Court might have taken in this matter is pure conjecture, is irrelevant for purposes of this writ proceeding, and certainly has no place in a statement of “facts.” With this issue Relator, throughout its brief, attempts to offer this court a “red herring” in the form of the Equal Protection issue alleged by Dr. Tendai in the underlying case. As will be shown, this Court need not and must not address the merits of the Equal Protection issue in this proceeding.

Next, Relator states that it ‘**lawfully** disciplined the license of Mark M. Tendai, M.D. . . .’ (Relator Brief, p. 7.) Respondent’s very order which is the subject of this proceeding refutes that statement, insofar as whether Relator’s discipline was “lawful.”

That issue remains to be determined upon ultimate appeal of the merits of the underlying case. Further, Relator notes that its discipline consisted of a public reprimand and sixty days' suspension on Dr. Tendai's license. (Id.) However, Relator neglects to mention another very damaging component of Dr. Tendai's discipline, which was that Relator also prohibited Dr. Tendai from ever again practicing obstetrics in the state of Missouri. (Relator's Appendix, p. C-3.)

At pp. 8-9 of its Brief, Relator attempts to explain the meaning of Respondent's order which is the subject of this proceeding, concluding that "Respondent appears to [sic] affirmed the Board's Disciplinary Order in its entirety." In addition to this erroneous statement being belied by Respondent's Order finding that Relator's failure to make adequate fact findings "constitutes error to the substantial prejudice of [Dr. Tendai]," (language also quoted by Relator), it is argumentative and should be stricken accordingly from Relator's Statement of Facts. (Relator's Brief, pp. 8-9.) Next, the Board cites Section 536.140.5, RSMo. 2000 in attempting to illustrate the limitations it believes were placed on Judge Brown when he heard the case on judicial review. Again, this discussion belongs in the Board's argument, rather than its Statement of Facts, and should be stricken. (Relator's Brief, p. 9.)

At p. 10, the Board directly states its "position" that so long as the Supreme Court had jurisdiction of Dr. Tendai's appeal, there was no basis for it to obtain the writ sought in this instant proceeding, and once again cites the core of its argument regarding Dr. Tendai's equal protection claims. Also on p. 10, the Board directly disputes a central argument asserted by Respondent heretofore, i.e. that the Supreme Court's *per curium*

opinion affirmed, in effect, Respondent's reversal and remand of the Board's disciplinary decision. (Relator's Brief, p. 10.) Respondent strongly disagrees with the Board's assertion that the Supreme Court decision was immaterial to this matter, and requests that the assertion be stricken as argumentative.

POINTS RELIED ON

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS, BECAUSE RESPONDENT, IN REVERSING AND REMANDING THE BOARD'S DISCIPLINARY ORDER FOR ENTRY OF LEGALLY ADEQUATE FINDINGS OF FACT, WAS ACTING WITHIN THE AUTHORITY GRANTED TO HIM PURSUANT TO SECTION 536.140, RSMO., IN THAT THE BOARD'S DISCIPLINARY ORDER CONTAINED NO SPECIFIC FINDINGS OF FACT FROM WHICH RESPONDENT COULD DETERMINE WHETHER DR. TENDAI'S EQUAL PROTECTION RIGHTS HAD BEEN VIOLATED, OR FROM WHICH RESPONDENT COULD DETERMINE WHETHER THERE WAS A RATIONAL BASIS FOR THE DISCIPLINE IMPOSED BY THE BOARD ON DR. TENDAI'S MEDICAL LICENSE.

Principal Authorities:

Heinen v. Police Personnel Bd. of Jefferson City, 976 S.W.2d 534 (Mo. App. W.D. 1998)

Weber v. Fireman's Retirement System, 899 S.W.2d 948, 950 (Mo. App. E.D. 1995)

Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n., 946 S.W.2d 199, 202 (Mo. banc 1997)

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS, BECAUSE SECTION 536.140 RSMO. AUTHORIZES RESPONDENT JUDGE BROWN TO REMAND THE BOARD'S DISCIPLINARY DECISION FOR ENTRY OF SUFFICIENT FACTUAL FINDINGS, AND BECAUSE A WRIT OF PROHIBITION IS NOT A PROPER REMEDY IN THE CIRCUMSTANCES, IN THAT: A) A WRIT OF PROHIBITION CANNOT BE ISSUED TO CORRECT AN ALLEGED ERROR OF LAW WHICH IS OTHERWISE REVIEWABLE ON APPEAL; B) A WRIT OF PROHIBITION CANNOT BE ISSUED TO UNDO ALLEGEDLY ERRONEOUS JUDICIAL PROCEEDINGS ALREADY ACCOMPLISHED.

Principal Authorities:

State ex rel. Chassaing v. Mummert, 887 S.W.2d at 573, 577 (Mo. banc 1994)

State ex rel. Liberty Mutual Ins. Co. v. Gum, 904 S.W.2d 447, 451 (Mo. App. W.D. 1995)

Deffenbaugh Industries, Inc. v. Potts, 802 S.W.2d 520, 521 (Mo. App. W.D. 1990)

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS, BECAUSE THE ENTRY OF AN ORDER IN PROHIBITION WOULD NOT

**BE APPROPRIATE, IN THAT RELATOR’S PETITION IS NOT TIMELY,
IN THAT THE SUPREME COURT’S OPINION ENTERED IN THE
UNDERLYING CASE, WHICH DETERMINED THAT THERE WAS NO
FINAL DECISION CAPABLE OF BEING APPEALED BECAUSE THE
BOARD HAD NOT YET ACTED ON THE REMAND ORDERED BY
RESPONDENT, IS CONTROLLING OF THIS MATTER, AND IN THAT
THIS COURT’S ENTRY OF A WRIT IN PROHIBITION WOULD
RESULT IN CONFLICTING DECISIONS AND MULTIPLE APPEALS.**

Principal Authorities:

Schumann v. Missouri Highway and Transp. Comm’n., 912 S.W.2d 548, 552 (Mo. App.
W.D. 1995)

ARGUMENT

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS, BECAUSE RESPONDENT, IN REVERSING AND REMANDING THE BOARD'S DISCIPLINARY ORDER FOR ENTRY OF LEGALLY ADEQUATE FINDINGS OF FACT, WAS ACTING WITHIN THE AUTHORITY GRANTED TO HIM PURSUANT TO SECTION 536.140, RSMO., IN THAT THE BOARD'S DISCIPLINARY ORDER CONTAINED NO SPECIFIC FINDINGS OF FACT FROM WHICH RESPONDENT COULD DETERMINE WHETHER DR. TENDAI'S EQUAL PROTECTION RIGHTS HAD BEEN VIOLATED, OR FROM WHICH RESPONDENT COULD DETERMINE WHETHER THERE WAS A RATIONAL BASIS FOR THE DISCIPLINE IMPOSED BY THE BOARD ON DR. TENDAI'S MEDICAL LICENSE.

1. The Board's Factual Findings Were Inadequate Under Missouri Law

At the outset, Respondent (also referred to herein as "Judge Brown") believes it is important to highlight that the matter before this Court is a writ proceeding, and not an appeal of the underlying case. While that should be obvious, it warrants emphasis due to the Relator's (also referred to herein as "the Board") repeated efforts in its brief to draw this Court into a review of the merits of the constitutional claim which was raised in the

underlying matter. As will be further discussed below, this Court is neither in the proper procedural posture, nor does it have jurisdiction, to determine whether Dr. Tendai proved his equal protection claims in the underlying case which was before Judge Brown for judicial review. The Board has either confused the merits of those claims with the narrow issue presented here, which concerns the legal sufficiency of the Board's written disciplinary decision entered against Dr. Tendai's medical license, or is attempting to confuse the two issues for this Court. As will be shown, these issues are not intertwined, and this Court's analysis in this proceeding should focus solely on the narrow issue of whether Judge Brown, sitting in review of the underlying administrative case pursuant to Chapter 536, RSMo. 2000, had the statutory authority and the discretion to remand for correction an agency decision which does not meet the requirements of Missouri law.

In Point I of its Brief, the Board's argument follows two central themes: 1) that Judge Brown exceeded his statutory authority and abused his discretion in remanding the Board's decision for additional findings of fact concerning Dr. Tendai's equal protection claim; and 2) that Dr. Tendai did not, and could not, make out of prima facie showing that his equal protection rights were violated by the fact that the Board imposed more severe forms of discipline on him than it had previously on other physicians who had committed similar violations of Chapter 334, RSMo 2000. The Board argues that because Judge Brown did not have before him evidence of the Board's discriminatory conduct toward Dr. Tendai, but merely a list of previous similar cases in which less discipline was imposed, he had no authority or discretion to remand the Board's decision for further factual findings on the equal protection issue.

The Board's arguments appear to be an attempt to lure this Court into a review of the merits of the underlying case, which is not only unnecessary for the disposition of this writ proceeding, but would exceed this Court's jurisdiction by causing it to engage in reviewing a constitutional claim, which is clearly a matter reserved for the exclusive jurisdiction of the Missouri Supreme Court. *See*, Mo. Const. Art. V Sec. 3. In fact, this Court may dispose of this matter without visiting the merits of the underlying constitutional claims, by simply and properly examining the adequacy of the factual findings contained in the Board's disciplinary decision involving Dr. Tendai. Missouri law sets forth clear and specific requirements which must be met by an agency in issuing any administrative decision or order and, as will be shown, the Board failed to meet these requirements when it issued its decision in the underlying case.

The Board itself notes the very language of Judge Brown's Order which should be dispositive of this matter:

"Petitioner's *Petition for Review* alleges that the Board's *Disciplinary Order* imposes discipline which violated Petitioner's Equal Protection rights, in that other physicians in substantially similar cases prior to Petitioner's disciplinary hearing had received substantially lesser disciplinary action imposed by the Board. The Board made no findings of fact as to the similarity or dissimilarity of Petitioner's case to the prior cases cited by Petitioner at the time of his disciplinary hearing. The Court finds that the Board failed to make findings of fact on this issue, which failure prevents this Court from conducting a review of Petitioner's claim. The Board's failure to make the required

findings of fact on a material issue constitutes error to the substantial prejudice of Petitioner.”

See “Order and Judgment On Petition for Review Under Chapter 536.100, RSMo.,” Relator’s Appendix pp. A-1 - A-5; quoted at p. 13 of Relator’s Brief (emphasis added). Judge Brown clearly found that the Board “failed to make findings of fact” on the “similarity or dissimilarity of [Dr. Tendai’s] case to the prior cases” placed in evidence by Dr. Tendai at his disciplinary hearing, and that this failure *‘prevents this Court from conducting a review of [Dr. Tendai’s] claim.’* Judge Brown further concluded that the Board’s failure to include these findings constituted “error to the substantial prejudice of [Dr. Tendai].” Explicit in Judge Brown’s Order was that he was prevented from conducting a meaningful judicial review of this issue because the Board had provided no factual basis in its decision for why Dr. Tendai was treated so differently than the other physicians in those eighty (80) some cases offered in evidence. Contrary to the Board’s assertion, Judge Brown’s reversal and remand was not done in order to require the Board to flesh out Dr. Tendai’s equal protection claim for him, but rather to allow Judge Brown to determine for himself, on judicial review, whether Dr. Tendai had presented a sufficient case for an equal protection violation. Missouri law, as discussed below, requires that Judge Brown, in performing his judicial review functions, be allowed to review this issue for himself, and therefore it is the Board which is attempting to usurp Judge Brown’s authority by seeking this writ.

Respondent properly determined that the Board’s disciplinary decision did not contain sufficient factual findings to allow meaningful review of Dr. Tendai’s equal

protection claims. The Board's decision of May 15, 2000, which purports to impose discipline upon Dr. Tendai's license, does not comply with Missouri law establishing the requirements for agency decisions. *See* Relator's Appendix, pp. C-1 - C-5.

It is axiomatic that "to present a subject for appellate review, the written decision of the administrative agency must show how the controlling issues have been decided." *Heinen v. Police Personnel Bd. of Jefferson City*, 976 S.W.2d 534 (Mo. App. W.D. 1998). Administrative agency findings in a contested case must constitute a factual resolution of the matters being contested before the agency; they must advise the parties and circuit court of the factual basis upon which the agency reached its conclusion and order; they must provide a basis for the circuit court to perform its function in reviewing the agency's decision, and show how controlling issues have been decided; and, a summary of testimony, a statement of the agency's ultimate conclusions, or a mere chronology of events is insufficient to accomplish these purposes. *Weber v. Fireman's Retirement System*, 899 S.W.2d 948, 950 (Mo. App. E.D. 1995). An agency's findings must be sufficiently specific to enable a reviewing court to do so intelligently and to determine if the facts provide a reasonable basis for the decision without an independent search of the record by the court; a reviewing court is not permitted to presume that the agency found the facts in accordance with the result reached. *Heinen*, 976 S.W.2d at 539-540. However, this presumption is exactly what the Board invites when it states that "Judge Brown could have noted that the lack of findings in the Disciplinary Order supported his determination," or that he "could have made a determination that there was no rational basis for Tendai's discipline." Relator's Brief, p. 14. Under *Heinen* and the

other cases cited above, Judge Brown is certainly not required to guess at what facts were before the Board to support its decision, as the Board intimates.

The Board's attempted "Findings of Fact, Conclusions of Law and Order," quite simply failed to accomplish the purposes set forth in the above cases. First, although captioned as such, the Order contained no delineated "findings of fact," but merely recited only a brief procedural history of the proceedings entitled "Statement of the Case." In its "Statement of the Case," which was the introductory portion of the Board's Disciplinary Order, the Board found that a) the AHC had issued its Findings of Fact and Conclusions of Law concluding that Dr. Tendai's license was subject to discipline, and that the AHC order was incorporated within the Board's order; b) the Board had received the AHC's record of proceedings; c) the Board had properly served Dr. Tendai with notice of its disciplinary hearing; d) the Board held a hearing for the purpose of determining appropriate disciplinary action against Dr. Tendai, at which the parties were represented by counsel; e) each Board member certified that he/she had read the AHC order, and that each Board member had attended the disciplinary hearing and participated in the Board's "deliberations, vote and order"; and f) Dr. Tendai is currently licensed by the Board. *See Relator's Appendix*, pp. C-1 - C-5. No reference was made to the Board's review or disposition of Dr. Tendai's evidence offered in support of his equal protection claim, and no effort was made to distinguish any of the many previous, factually similar, cases offered by Dr. Tendai in which the Board imposed substantially less discipline. *Id.*

The Board's "Conclusions of Law" were simply that a) the Board has jurisdiction over the disciplinary proceeding, and b) Dr. Tendai's license is subject to disciplinary action by the Board. L.F. 2-3. Neither the "Statement of the Case" nor "Conclusions of Law" contain any reference to specific evidence or facts on which the Board relied in determining the nature of Dr. Tendai's discipline. The "statement" section is merely a brief procedural chronology of the case prior to the Board's disciplinary hearing. Regardless of these omissions, the Board ordered that Dr. Tendai's license be publicly reprimanded, and that his license be suspended for a period of sixty (60) days from the order's effective date of May 15, 2000. Dr. Tendai was also restricted from ever again practicing obstetrics or obstetrical procedures in the state of Missouri, and was required to attend a medical documentation course. The Board's order also provided for additional discipline in the event of future violations by Dr. Tendai. *See id.*

Clearly, the opportunity for meaningful and intelligent review was denied to Dr. Tendai, and Respondent, by the scant nature of the Board's Disciplinary Order. The Disciplinary Order provided no basis for the ultimate conclusion reached by the Board, that being Dr. Tendai's discipline, and thus Respondent was well within his authority to reverse and remand the decision for additional factual support. The decision was a "mere chronology of events" with a statement of the Board's ultimate conclusion, which was insufficient under the aforementioned standards. *See, Weber v. Fireman's Retirement System, supra.*

Additionally, the Board misreads *State ex rel. Chassang v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994) to hold that Judge Brown had no authority to remand the

Board's decision for additional findings unless he was convinced that Dr. Tendai had already proved his equal protection claim. The circular logic of this assertion defeats itself; of what utility would be the ability to remand only in cases where the petitioner had already made his case? Again, Judge Brown's remand was obviously directed toward giving him the factual findings he needed to determine whether Dr. Tendai had made out his case on equal protection, and thus did not "shift the burden" to the Board to prove Dr. Tendai's case for him, as it suggests. *See Relator's Brief*, p. 14.

2. *Dr. Tendai Presented Sufficient Evidence to Allow Judge Brown's Review of Equal Protection Claim*

The Board next argues that Dr. Tendai failed to show, and cannot show, that his discipline was "arbitrary, discriminatory or without some rational basis," and that therefore Judge Brown had no authority to remand for the additional fact findings. *See Point I.C., Relator's Brief*, pp. 15-19. It is with this argument that the Board clearly invites this Court to exceed its constitutional jurisdiction, by attempting to reach the merits of the constitutional claims which were raised in the underlying proceeding. As demonstrated in the preceding section, however, Judge Brown clearly has the authority, pursuant to Section 536.140 RSMo.2000, to remand the Board's decision when it does not meet the requirements of Missouri law, and thus it is not necessary and would be inappropriate for this Court to be drawn into a substantive review of the equal protection claims which were asserted below. The core of this writ proceeding distills to a very simple issue: did the Board's disciplinary decision of May 15, 2000 comply with Missouri law applicable to the requirements for orders of administrative agencies? Judge

Brown concluded that it did not and then, acting within his authority (as discussed above), directed the Board to correct its decision on remand. Only after the Board had done so would Judge Brown have been able to conduct the “meaningful review” of Dr. Tendai’s equal protection claims as required by Missouri law.

Nonetheless, Respondent further disputes the substance of the Board’s arguments on this issue. It will be conceded that Dr. Tendai is not a member of a recognized “suspect classification” merely by virtue of his licensure as a medical doctor. However, the controlling issue in the underlying case will be whether the Board had a rational basis for the discipline it imposed on Dr. Tendai’s license, and accordingly whether the discipline advanced any legitimate state interest. This issue was placed squarely before Judge Brown during the underlying judicial review proceedings, and thus he was required to be presented with adequate fact findings by the Board in order to resolve the question of whether the Board had any “rational basis” for the discipline it imposed. In his brief submitted to Judge Brown during judicial review, Dr. Tendai cogently argued that the Board had not shown and could not show any rational basis for the particular discipline it imposed on Dr. Tendai, in comparison with the comparably less discipline imposed in those many previous similar and identical cases. The substance of Dr. Tendai’s argument on this issue then, and Respondent’s argument in the present writ proceeding, follows.

Professional licensing laws, such as those found in Chapter 334, are remedial in nature, and are enacted for the welfare of the public. *See, Bhuket v. State Bd. of Registration for the Healing Arts*, 787 S.W.2d 882 (Mo. App. W.D. 1990). In the underlying case, the Board utterly failed to produce any evidence upon which to conclude

that the public's welfare would be advanced in any conceivable fashion by suspending Dr. Tendai's license and prohibiting him from ever again practicing obstetrics. To the contrary, Dr. Tendai produced substantial, and uncontradicted, evidence during the Board's hearing to show that he is a caring, competent, and respected physician, and that his continued practice poses no threat of harm to the public's welfare. In short, the Board had no evidence before it, and indeed made no finding, that its interest in protecting the public would be advanced by the discipline it chose to impose upon Dr. Tendai.

Even where a fundamental right is not at issue, or where a person is not a member of a "suspect" classification, a person who is treated differently from others under the law is entitled to judicial scrutiny of that law to determine whether the treatment is rationally related to a legitimate governmental interest. *See, Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n.*, 946 S.W.2d 199, 202 (Mo. banc 1997) (internal citations omitted); *see also, Artman v. State Bd. of Registration for the Healing Arts*, 918 S.W.2d 247, 252 (Mo. banc 1996); citing *Gregory v. Ashcroft*, 501 U.S. 452, 470-71, 111 S.Ct. 2395, 2406, 115 L.Ed.2d 410 (1991).

Here, it cannot be disputed that the general goal of protecting the public from incompetent physicians (as embodied in §334.100) is a "legitimate governmental interest" for purposes of equal protection analysis, which has been legislatively granted to the Board by enactment of Chapter 334, RSMo 2000. However, the Board's application of §334.100 in the underlying case violates equal protection principles.

As applied to Dr. Tendai, the discipline ultimately ordered by the Board pursuant to §334.100 bears no "rational relationship" to the Board's interest in protecting the

public. This is because the Board had no evidence before it upon which to believe that Dr. Tendai posed any threat to the public. The only evidence as to Dr. Tendai's ability to safely and competently continue his practice was that which he presented, which evidence establishes that Dr. Tendai is an asset to the medical community and that he enjoys an excellent reputation among his colleagues and within his community generally. In other words, the Board had no basis to conclude that the public welfare was in jeopardy, and thus had no governmental interest to "protect" via the suspension and restriction of Dr. Tendai's license. Coupled with this is the fact that the Board made no effort to distinguish the facts of Dr. Tendai's case from those of the many other disciplinary cases it had previously handled, in which other physicians had received no discipline or only minimal discipline for similar conduct reaching similar results. By having his license suspended and severely restricted in scope, Dr. Tendai was clearly treated differently from other physicians engaging in conduct similar to that alleged in this case. As such, the Board's disciplinary action bears no rational relationship to any interest it apparently believed it had to protect the public from Dr. Tendai to any greater degree than other similarly situated physicians, and thus, Dr. Tendai argued, the Board's decision must be reversed on equal protection grounds.

To survive an equal protection challenge the Board must be able to demonstrate that its disciplinary action, which was taken pursuant to §334.100, RSMo. 2000, bears a rational relationship to some legitimate governmental interest. *See Adams Ford Belton, supra*. While conceding that the state (via the Board) has a legitimate interest in protecting its citizens from incompetent or negligent physicians, Dr. Tendai argued that

the discipline imposed on him bore no rational relationship to furthering this state interest.

By ignoring this issue in its disciplinary decision, the Board has failed to offer any justification for why it imposed discipline upon Dr. Tendai which was substantially more harsh than that which was imposed on numerous other physicians found to be responsible for very similar conduct. The Board failed to provide Judge Brown with any basis on which to conclude that its disciplinary determination bore *any* degree of rationality toward furthering the purpose behind §334.100.2; i.e., protection of the public from incompetent physicians. The standard of rationality under equal protection analysis “must find some footing in the realities of the subject addressed by the [challenged] legislation.” *Heller v. Doe*, 509 U.S. 312 at 320; 113 S.Ct. 2637 at 2643; 125 L.Ed.2d 257 (1993). The Board has completely failed to offer any basis for concluding that its disciplinary decision helps to advance its interest in protecting the public, and thus its disciplinary order was deficient and required supplementation to allow a meaningful review by Judge Brown.

There is a fact which further prevents the Board from arguing that its disciplinary decision (including the suspension of Dr. Tendai’s license) was necessary to protect the public from his “incompetent” or “grossly negligent” practices. Section 334.102, RSMo. 2000, creates a procedure for expedited disciplinary hearings for physicians believed by the Board to pose a clear and present danger to the public based on their conduct or practices. Yet, the Board never exercised this authority. Had the Board truly believed that Dr. Tendai presented a danger to the public by remaining in practice, it could have

(and should have) sought expedited discipline of Dr. Tendai's license under this statute. Further, if the Board were concerned with Dr. Tendai being a danger to the public, why would it have originally offered to settle for a simple reprimand of his license? This step clearly would not have accomplished any of the Board's goals toward protecting the public, revealing that the Board understood that Dr. Tendai's conduct toward Ms. Grindle, even if true as alleged, presented no future "danger" to the public. Viewed under the circumstances existing during the Board's disciplinary hearing and proceedings, it becomes quite clear that the Board ultimately sought to punish Dr. Tendai, which of course is not the purpose behind remedial statutes such as §334.100.2. *See, Younge v. State Bd. of Registration for the Healing Arts*, 451 S.W.2d 346, 349 (Mo. 1969). The facts of this case simply do not support a disciplinary order premised on protection of the public. (See Plaintiff's Brief, pp. 46-50). There is thus no rational relationship to be shown under equal protection analysis.

The Board, citing *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100 (Mo. banc 1998), asserts that "if any statement of facts reasonably may be conceived to justify the means chosen to accomplish that purpose" then the governmental action survives judicial review. Here, however, the Board did not provide "any statement of facts" in its decision to support the discipline of Dr. Tendai. Thus, Judge Brown had no way to review whether Dr. Tendai had shown an absence of any rational basis for the Board's decision, and thus remanded for the Board to provide the necessary factual support for its decision. That is precisely why it would be improper for this Court to even consider, in this writ proceeding, whether the Board had any rational basis for its

disciplinary decision. The issue this Court must focus on is whether Judge Brown had sufficient facts before him, in the Board's decision, to determine whether there was a rational basis for the discipline ordered by the Board. Dr. Tendai made an ample record before the Board to support his argument that there was no rational basis for his discipline being more severe than in many previous similar or identical cases; it was then up to the Board to state its basis for this different treatment. It did not do so, which soundly refutes the Board's argument in this matter that Judge Brown's remand improperly shifted the burden on this issue. It is the Board's own failure to provide factual support for its disciplinary decision, after Dr. Tendai had presented abundant evidence of his differential treatment, which led to Judge Brown's remand.¹

At pp. 18-19 of its Brief, the Board, quite belatedly, attempts to offer some particular circumstances concerning Dr. Tendai's conduct which might have been used by the Board in support of its disciplinary decision. However, none of these factors were discussed, or even mentioned, in the Board's May 15, 2000 Order which was before

¹In addition, the Board's statement that Dr. Tendai merely presented the Board with a "list" of previous cases is grossly inaccurate. Rather than a list, Dr. Tendai presented the Board with copies of its previous disciplinary decisions in some eighty (80) cases in which the Board offered minimal, if any, discipline against physicians in which cause for discipline had been determined. These exhibits encompassed over 800 pages of evidence introduced in support of Dr. Tendai's equal protection claim and claim of discriminatory treatment.

Judge Brown for judicial review. Again, Judge Brown cannot be forced to “presume that the agency found the facts in accordance with the result reached.” *Heinen v. Police Personnel Bd. of Jefferson City, supra*, 976 S.W.2d at 539-40. It borders on the egregious for the Board to now attempt to use these factors to support its writ petition to prevent it from having to obey Judge Brown’s remand, when it could have, a long time ago, issued an amended disciplinary decision citing these very factors! The Board’s attempt to have this Court find, in this proceeding, that these factors show a rational basis for the Board’s decision should be soundly rejected. That is not a matter for this Court’s determination, either procedurally or jurisdictionally.

In view of the above, the *Burgdorf, Linton* and *M.M. v. State Bd. of Accountancy* opinions have no relevance to this matter. While those cases all hold to varying degrees that merely showing a discrepancy among chosen discipline in similar cases is insufficient to prove a constitutional violation, none of them address the core issue before this Court: whether the Board set forth a sufficient factual basis from which a reviewing court could determine that there was a rational basis for the discipline imposed.

In summary, the Board is incorrect in concluding that Judge Brown improperly substituted his discretion for the Board’s discretion when he remanded the disciplinary decision for additional fact findings. Pursuant to Section 536.140.5, RSMo. 2000, Judge Brown properly remanded the Board’s decision and simultaneously directed that it take the “further action” of correcting its order to include factual findings that would allow him to meaningfully review the issue of whether there was any rational basis for the

Board's differential treatment of Dr. Tendai, as compared with the many other cases which were placed in evidence before the Board.

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS, BECAUSE SECTION 536.140 RSMO. AUTHORIZES RESPONDENT JUDGE BROWN TO REMAND THE BOARD'S DISCIPLINARY DECISION FOR ENTRY OF SUFFICIENT FACTUAL FINDINGS, AND BECAUSE A WRIT OF PROHIBITION IS NOT A PROPER REMEDY IN THE CIRCUMSTANCES, IN THAT: A) A WRIT OF PROHIBITION CANNOT BE ISSUED TO CORRECT AN ALLEGED ERROR OF LAW WHICH IS OTHERWISE REVIEWABLE ON APPEAL; B) A WRIT OF PROHIBITION CANNOT BE ISSUED TO UNDO ALLEGEDLY ERRONEOUS JUDICIAL PROCEEDINGS ALREADY ACCOMPLISHED.

1. *Section 536.140 Authorizes Judge Brown's Remand/Remand Was Not Contrary to Missouri Case Law*

The Board has read Section 536.140.4 and .5 very selectively in order to meet its needs in this matter. Section 536.140.4 indeed allows the reviewing court to “. . .remand the case to the agency with directions to reconsider the same in the light of such evidence [previously not produced].” However, Section 536.140.5 provides in addition that the court “. . .may order the agency to take such further action as it may be proper to require.

. .”. The Board has cited no case authority to support its argument that these two subsections of Section 536.140 prohibit a reviewing court from remanding an agency decision for correction of obvious deficiencies in factual content. Such a conclusion would run completely afoul of the authorities cited above, which establish specific requirements for agency findings and conclusions. If a circuit court on judicial review cannot remand an administrative decision for such corrections, how would those corrections ever be enforced upon the agency? Under the Board’s argument, what “check” would there be on agency authority to ensure that a legally adequate factual basis was shown for decisions made by the agency? In short, there would be none. The Board’s restrictive and strained reading of Section 536.140 cannot be reconciled with the long-standing requirements governing agency decisions, is not supported by case law, and should be rejected.

In fact, this Court itself has acknowledged that reversal or remand of an agency decision are “adjudications open to the circuit court under §536.140.5.” *See Deffenbaugh Industries, Inc. v. Potts*, 802 S.W.2d 520, 521 (Mo. App. W.D. 1990). *Deffenbaugh* further states that Section 536.140.5 grants the circuit court authority to “examine and correct the agency decision, but not to form a plenary judgment.” 802 S.W.2d at 523. Respondent’s order in this case fully complies with this standard, by directing the Board to correct its insufficient findings but not forming a “plenary judgment” eclipsing the Board’s decision.

Judge Brown was clearly concerned with ensuring that the Board’s decision met the minimum standards required by Missouri law, in order to allow him to conduct a

meaningful review of Dr. Tendai's claims made possible by specific factual findings on which the Board's ultimate disciplinary decision was based. Therefore, the Board's principal case relied upon, *Comfort v. County Council of St. Louis County*, 822 S.W.2d 460, 462 (Mo. App. E.D. 1991) is wholly inapposite to the facts of the present case. There is no question in this case but that the disputed evidence (i.e. the decisions in many previous similar cases) was before the Board when it entered its disciplinary decision. Neither Respondent nor Dr. Tendai has stated otherwise. The remand in this case was ordered due to the Board's failure to produce any findings of fact which would allow Respondent to review its basis for disciplinary decision, which of course prevented Respondent from having any basis on which to determine whether the Board had violated Dr. Tendai's right to equal protection in issuing its chosen discipline. Once again, the Board would confuse this Court as to the real issues before it. This proceeding does not involve a remand to supplement the record with additional evidence, as was examined in the *Comfort* opinion, rather the remand was solely concerned with the sufficiency (or lack thereof) of the Board's written findings of fact and conclusions of law. *Comfort* is not controlling of the facts presented herein.

The Board itself admits, at page 23 of its Brief, that "[Dr.] Tendai put extensive evidence in the record which the Board was clearly aware of as to the supposed lesser discipline on physicians in similar cases." There is thus no dispute among the parties that this evidence was already in the record when Judge Brown had the case before him for review, which mandated that he understand how the Board distinguished these prior cases in its determination of discipline for Dr. Tendai. As discussed more thoroughly under the

previous point, Judge Brown had no way to determine how, or even whether, the Board had distinguished these previous cases and thus had no way to determine whether the Board had a rational basis for its differential treatment of Dr. Tendai.

Similarly, the Board's attempt to distinguish *Sullivan County v. State Tax Comm'n.*, 513 S.W.2d 452 (Mo. 1974) and *Labrayere v. Goldberg*, 605 S.W.2d 79 (Mo. banc 1980) is unpersuasive. In *Sullivan*, the Supreme Court affirmed an order of the circuit court remanding an agency decision for further proceedings because the Tax Commission "cannot or did not include in their decision and order findings of fact and conclusions of law as required by law." *Sullivan*, 513 S.W.2d at 454. Remand under these circumstances was appropriate, according to the Supreme Court, because "the commission must make findings of fact and conclusions of law from which a review [sic] court can know the basis upon which the commission acted[.]" *Id.* The Board argues that *Sullivan* should have no bearing on the current case because Judge Brown "had enough evidence in the record to rule on Tendai's equal protection assertion without the necessity of remanding. . .". See Petition, p. 8. Relator's argument again completely ignores or misses the purpose behind Judge Brown's remand: to obtain a legally sufficient, factually supported disciplinary decision on which to conduct a meaningful review of Dr. Tendai's equal protection claim. The Board cannot be allowed to decide for itself (through this action in prohibition) what evidence was "enough" for Judge Brown in performing this review, and even that suggestion is misleading in that Judge Brown was not remanding the case for introduction of "more evidence", but for legally adequate findings of fact supporting the Board's disciplinary decision. As such, Respondent was attempting to

perform his statutory role of reviewing the question of law surrounding the equal protection claim and the adequacy of the Board's findings from which to do so. In proceedings pursuant to Section 536.140, questions of law are clearly matters for the independent judgment of the reviewing court. *Campbell v. Director of Revenue*, 927 S.W.2d 452, 454 (Mo. App. W.D. 1996).

2. *A Writ of Prohibition Would Be Inappropriate Under Missouri Case Law*

A. Not Available to Correct Errors of Law

In Missouri, the remedy of prohibition is available in three general circumstances. First, it may be used where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction. Second, prohibition may be used to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated. Third, it may be used in situations where a party has no adequate remedy on appeal and would otherwise suffer some "absolute irreparable harm" in its absence. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994); *citing State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-63 (Mo. banc 1986). As will be demonstrated below, none of these circumstances are present in this matter, and thus the Board's Petition should be denied. The Board's procedural reasoning in this matter is flawed, as it is alleging that Respondent has committed errors of law in reaching its decision to remand the Board's disciplinary decision.

The Missouri Supreme Court has repeatedly held that a writ of prohibition is not appropriate to correct errors of law which are reviewable on appeal. *See State ex rel.*

Chassaing v. Mummert, 887 S.W.2d at 577; *State ex rel. Morasch v. Kimberlin*, 654 S.W.2d 889, 892 (Mo. banc 1983). In summarizing the proper use of the remedy, the Court in *Mummert* stated as follows:

“ . . . Prohibition will lie when there is an important question of law decided erroneously that *would otherwise escape review by this Court*, and the aggrieved party may suffer considerable *hardship and expense* as a consequence of the erroneous decision.”

State ex rel. Chassaing v. Mummert, 887 S.W.2d at 577, *citing State ex rel. Noranda Aluminum, Inc. v. Rains, supra*, 706 S.W.2d at 862-63 (emphasis added). Although prohibition may be available, under the proper circumstances, to prevent “usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction”², it is clearly not available to challenge or correct alleged errors of law when those errors are subject to review on appeal. In the present case, the Board had ample opportunity during appeal to raise the question of Respondent’s jurisdiction to remand its disciplinary order for more detailed factual findings, but either neglected to do so or elected not to do so.³

²*State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d at 862-63 (Mo. banc 1986).

³Further, as was set forth above, Respondent was well within his jurisdiction and authority to remand the Board’s decision for entry of factual findings meeting at least the minimum standards required by Missouri law for such decisions.

Even more fundamental is that the issue presented in this case will not “otherwise escape review” on appeal. Ideally and properly, the Board would simply obey the remand, issue a new decision incorporating its factual basis for discipline, and then (pursuant to the Supreme Court’s opinion in this case) that decision will be final for appeal and the Board could address this alleged error of law during that appeal. It is highly questionable why the Board would seek to pursue the present avenue for relief, costing itself considerably more resources than had it simply issued a new disciplinary decision and raised the remand question along with all others on appeal of the final, corrected decision. As such, the parties to this matter are facing these protracted proceedings as well as appeal of any ultimate, final decision which results. For that reason, issuance of a permanent writ in this case would clearly result in a continuing waste of judicial resources in the adjudication of the underlying case.

In addition, the Board has not alleged, even in the instant Petition, that it will suffer “considerable hardship and expense” as a result of Respondent’s remand order. Perhaps the Board implicitly acknowledges the strain of credibility such an allegation would create, given: a) the length of time it has waited to raise the issue of Respondent’s jurisdiction (fourteen months subsequent to Respondent’s entry of the Order); b) its failure to apprise the Supreme Court of this issue during appeal; and c) the legal fees, expenses, and other resources it has expended in the appeal of this matter and in preparing the instant Petition, as compared with the relatively small amount of time which would be required to prepare factual findings in compliance with Respondent’s remand order.

B. Prohibition Not Available to “Undo” Allegedly Erroneous
Proceedings Already Accomplished

The Board’s Petition in the present matter is a perversion of the purposes underlying the remedy of prohibition. Missouri law is clear and consistent in providing that prohibition cannot be used as a substitute for direct appeal, and “cannot be used to undo erroneous judicial proceedings.” *State ex rel. Liberty Mutual Ins. Co. v. Gum*, 904 S.W.2d 447, 451 (Mo. App. W.D. 1995); *citing State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). The primary purpose behind prohibition is to prevent a trial court from exceeding its jurisdiction. *See State ex rel. Armstrong, Teasdale, et. al v. Kohn*, 850 S.W.2d 86, 89 (Mo. banc 1993).

While certainly disputing the Board’s central argument that Respondent did not have jurisdiction to remand the Board’s order for additional factual findings (see *infra*), Respondent submits that whatever the outcome of that issue may be, prohibition may not, in any event, now be used to undo Respondent’s reversal and remand of the Board’s disciplinary decision. It simply cannot be used to undo erroneous judicial proceedings which have already been accomplished. *State ex rel. Ellis v. Creech*, 259 S.W.2d 372, 375 (Mo. banc 1953).⁴

⁴*Creech* involved the question of whether prohibition was appropriate to stop enforcement of an injunction entered without proper jurisdiction by the Respondent, a circuit judge. Under the facts of that case, the Supreme Court made the writ in prohibition absolute because “some part of” the circuit court’s action “remained to be

Therefore, under any scenario argued by the Board in challenge of Respondent's jurisdiction, this Court should summarily deny the Board's Petition for writ because it is so obviously intended to undo that portion of Respondent's order reversing and remanding the Board's decision in this matter. Prohibition cannot be used in this manner.

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS, BECAUSE THE ENTRY OF AN ORDER IN PROHIBITION WOULD NOT BE APPROPRIATE, IN THAT RELATOR'S PETITION IS NOT TIMELY, IN THAT THE SUPREME COURT'S OPINION ENTERED IN THE UNDERLYING CASE, WHICH DETERMINED THAT THERE WAS NO

performed"; i.e., the continuing enforcement of the injunction which was granted without jurisdiction. In the present case, no part of Respondent's challenged action remains to be performed, because the remand left no continuing jurisdiction with Respondent, but rather shifted it back to the Board. In addition, Missouri courts have stated that prohibition "is preventative in nature rather than corrective," *State ex rel. Deering v. Corcoran*, 652 S.W.2d 228, 229 (Mo. App. E.D. 1983); and "issues to restrain the commission of a future act and not to undo one that has already been committed." *State ex rel. Hamilton v. Dalton*, 652 S.W.2d 237 (Mo. App. E.D. 1983); *State ex rel. Ellis v. Creech*, *supra*, 259 S.W.2d at 375.

FINAL DECISION CAPABLE OF BEING APPEALED BECAUSE THE BOARD HAD NOT YET ACTED ON THE REMAND ORDERED BY RESPONDENT, IS CONTROLLING OF THIS MATTER, AND IN THAT THIS COURT'S ENTRY OF A WRIT IN PROHIBITION WOULD RESULT IN CONFLICTING DECISIONS AND MULTIPLE APPEALS.

1. The Board's Petition Is Untimely

Relator argues, in essence, that the instant Petition is timely because it would not have been "appropriate" to challenge Respondent's jurisdiction to remand the Board's order prior to the final determination of the Supreme Court. Rule 84.22 states as follows:

(a) No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.

(b) If a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, no original remedial writ shall be issued by an appellate court, or any district thereof, with respect to any matter collateral to the appeal unless the appeal is pending in the court and district, if the appeal has been filed, or the court and district would have jurisdiction of the appeal if one is timely filed. * * *

The Board cites Rule 84.22(b) in support of its argument that it was procedurally not entitled to seek an order of prohibition until after the conclusion of Dr. Tendai's

appeal to the Supreme Court. However, despite citing no case authority for this argument, the Board then proceeds to argue why it believes Respondent's remand decision was legally incorrect.

The language of Rule 84.22(b) itself prevents seeking a writ “[i]f a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, * * * **unless** the appeal is pending in the court and district, if the appeal has been filed, **or** the court and district would have jurisdiction of the appeal if one is timely filed.” (Emphasis added). In other words, in the present case the appeal was filed and “pending” in the Supreme Court, jurisdiction being proper there in light of the constitutional issues under review, and thus the Board was not prohibited by Rule 84.22(b) from seeking its remedy at that time. Rule 84.22(a) affirms this with its statement that no “original remedial writ” can be issued by an appellate court “in any case wherein adequate relief can be afforded by an appeal * * *.” The Board has alleged legal error on the part of Respondent, which quite clearly could have been addressed during the Supreme Court appeal. The Board, under Rule 84.22, could have either sought its writ of prohibition during the appeal or, more appropriately, raised and argued the issue of Respondent's jurisdiction as an issue on appeal to the Supreme Court, or in any appeal of the final decision reached in this matter. However, the Board's failure to confront this issue prior to the time at which it will actually be required to comply with Respondent's remand order is unpersuasive as an argument supporting entry of this Court's order in prohibition.

2. *Supreme Court's Decision Is Controlling*

This Court lacks jurisdiction to entertain the Board's Petition in Prohibition. On its face, the Supreme Court's Opinion in SC83783 clearly had the effect of placing jurisdiction of this matter with the Board. *See* Relator's Appendix, pp. B-1 - B-2. The Supreme Court found the partial reversal and remand entered by Judge Brown to create "a live issue that has not been resolved," and further stated that "a ruling [by the Board on remand] in Dr. Tendai's favor could moot his appeal." *Id.* Thus, the Supreme Court itself has determined that there can be no further appeal of the merits of this action until after the Board has taken action on the remand entered by Judge Brown. Thus, this Court's Preliminary Order in Prohibition is directly contrary to the decision of the Supreme Court, by having the effect of preventing the Board from issuing its decision on remand. As the matter now exists, the decisions of the Supreme Court and this Court's preliminary order cannot both stand. They are logically and procedurally inconsistent with one another. To enter or make absolute its preliminary order, this Court will be necessarily forced to disregard, and essentially overrule, the Supreme Court's prior decision in this matter. Obviously, this Court cannot, consistent with its jurisdictional limitations, disregard the Supreme Court's decision. *See* Mo. Const. Art. V, § 2, which states as follows:

The supreme court shall be the highest court in the state. Its jurisdiction shall be coextensive with the state. Its decisions shall be controlling in all other courts. ***

It is fundamental that the Court of Appeals is constitutionally bound to follow the last controlling decision of the Supreme Court. *Schumann v. Missouri Highway and Transp. Comm'n.*, 912 S.W.2d 548, 552 (Mo. App. W.D. 1995).

This matter presents the question of whether the Court of Appeals may enter an order in prohibition, which has the effect of nullifying a previous decision of the Supreme Court in the same case. By dismissing the appeal to it for lack of finality, the Supreme Court signaled to the parties that there could be no final, appealable decision in the underlying case until the Board acted on the reversal/remand ordered by Judge Brown. Implicit therein is the Supreme Court's affirmation of Judge Brown's decision to remand for the reasons stated in his Order and Judgment. The Supreme Court, of course, may review *sua sponte* jurisdictional matters. *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 351 (Mo. banc 2001). It would appear that the Supreme Court found no error in Judge Brown's remand, because that order formed the very basis for its ultimate conclusion that the case lacked finality.

This Court's Preliminary Order In Prohibition, however, throws the case in procedural "limbo." If this Court proceeds to make its Preliminary Order in Prohibition absolute, of what significance or effect is the Supreme Court's declaration regarding the need for finality? The Supreme Court's decision would be made a nullity at that point, and its effect at the present time (given this Court's preliminary order) is certainly unclear. For constitutional purposes, the Supreme Court decision is now the "controlling decision" of this case, and cannot be nullified in the manner that would result from this Court's entry of an order in prohibition.

For these reasons, dismissal is the only disposition this Court may make of the Board's petition in prohibition which will not conflict with the Supreme Court's decision in this case. The entry of a permanent writ, in fact, would have the potential to result in multiple appeals arising from the same underlying matter. Further, any order making absolute this Court's Preliminary Order would leave this case in procedural confusion, and would quite likely result in the parties being forced to re-try the underlying judicial review proceedings.

WHEREFORE, for all of the above-stated reasons, Respondent, Circuit Judge Brown, respectfully requests that this Court: 1) **quash** its "Preliminary Order in Prohibition;" 2) **deny** entry of a permanent writ of prohibition in the above-referenced matter; and 3) **dismiss** Relator's Petition for Writ of Prohibition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed, by U.S. mail, postage prepaid on December 4, 2002 to Glenn E. Bradford, Glenn E. Bradford & Associates, P.C., The Palace Building, 1150 Grand, Ste. 230, Kansas City, Missouri 64106, phone (816) 283-0400, Attorney for the Board of Healing Arts.

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CERTIFICATE OF COMPLIANCE WITH RULES

Pursuant to Rule 84.06(b) and (c), I hereby certify that this Brief meets the type volume limitation and that it contains 8,672 words and 706 lines, according to the word counting feature of Microsoft Word 97, the program used to produce it. In addition, this Brief complies with Rule 84.06 in that the text of the body of the brief is in 13-point Times New Roman type. I further hereby certify that the enclosed disk has been scanned for viruses and that it is virus-free.

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